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IN THE

Supreme Court of the United States

October Term, 1953.

No. 156

AIR DEVICES, INC.,

Petitioner,

vs.

AIR FACTORS, INC., CONDITIONAIRE, LTD., and FRED M. McCOWN,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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AIR FACTORS, INC., CONDITIONAIRE, LTD., and FRED M. McCOWN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner Air Devices, Inc., a corporation, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the decision of that court affirming the judgment of the United States District Court for the Southern District of California holding United States Letters Patent 2,240,617 valid but not infringed.

The Court of Appeals for the Ninth Circuit originally, on May 27, 1953, filed its decision and judgment reversing the judgment of the District Court and holding the patent in issue infringed. This decision is reported at 97 United States Patent Quarterly 519. Thereafter a petition for rehearing was filed by appellees and an order was filed July 13, 1953, granting said petition for rehearing. An oral rehearing was held on November 20, 1953, and the opinion of the Court upon rehearing, together with the judgment, was filed and entered February 15, 1954 [R. 325-331]. The opinion is reported at 210 F. 2d 481. Subsequent to the entry of said judgment, your petitioner filed a petition for rehearing *en banc*. Said petition for rehearing was denied by the Court on March 24, 1954 [R. 332].

This Court has jurisdiction under Title 28, United States Code, Section 1254. A certified copy of the transcript of the record in this case is furnished herewith in accordance with Rule 38 of the Rules of this Court.

Summary Statement of the Matter Involved.

Petitioner, Air Devices, Inc., is the owner of United States Letters Patent 2,240,617, issued May 6, 1941, for an invention relating to air distributors and entitled "Air Distributor." The patent was issued to the petitioner by virtue of an assignment from the inventor and applicant P. D. Harrigan, as shown by the patent [R. 259]. An action for infringement was filed in the United States District Court for the Southern District of California, Central Division, against the respondents, charging infringement of said patent and praying for an injunction and damages [R. 3-5]. Respondents' answer denied in-

fringement and alleged that petitioner's patent was void for lack of novelty and invention [R. 6-12].

The District Court found the petitioner's patent to be valid if limited to the specific construction described in said Letters Patent and that the accused devices did not infringe the claims in issue, *i.e.,* 1, 2 and 5, and dismissed the action [R. 57].

The decision of the District Court appears at Record pages 43-51. It is reported at 94 Fed. Supp. 819, 88 U. S. P. Q. 454.

The patent and the claims thereof pertain to an air distributor used in conjunction with an air conditioning system. The construction described in the patent, although containing no moving parts, functions to discharge the entire mass of air emerging from the distributor substantially parallel to a ceiling or to a wall in which the distributor is placed for the purpose of preventing drafts upon occupants of the room [R. 76-77]. This is accomplished by means of a series of parallel inclined louvers which interrupt the flow of the air coming into the distributor from the air conditioning system and by angled and directional vanes cooperating with the inclined louvers to cause the air to follow a different angle or direction than that which the air would follow if it merely emerged at the angle of the inclined louvers.

The air is discharged from the distributor at high velocity, *i.e.,* substantially twice the velocity of the air entering the distributor [R. 79]. The increased velocity through the distributor is due to the inclination of the parallel louvers causing a restricted orifice through which the air is discharged. This mass of air although traveling at a

high velocity is controlled so that at a relatively few feet from the distributor the discharged air is merged and commingled with the room air and its energy or force dissipated before there is any contact with any occupants [R. 92].

Although in an art which has become increasingly important in the past few years and wherein a large number of patents have been issued, the patent was the first to discharge and control an entire mass of air from the distributor in the manner described and, therefore, has produced a new result. The Court of Appeals for the Ninth Circuit in its original opinion dated May 27, 1953, had no difficulty in finding that none of the prior art patents had the construction described and claimed in the patent or disclosed the means or mode of operation of the patent in suit.

Admittedly the accused structure and the structure of the patent in suit produce the same result [R. 138]. The accused structure is exemplified by Plaintiff's Physical Exhibit 5 and Defendants' Physical Exhibit H. The air distributor of the patent in suit is exemplified by Plaintiff's Physical Exhibits 2, 3 and 4.

The Court of Appeals for the Ninth Circuit in its original decision of May 27, 1953, had no difficulty in finding that the accused device, as exemplified by Plaintiff's Exhibit 5, was merely an imitation of the patent invention and only varied in unimportant and unsubstantial details. This was so because in both the patent and the accused structure parallel inclined louvers and angled and directional vanes are employed and cooperate in such a manner as to cause the air to follow a different angle or direction than that which the air would follow if it were

discharged solely at the angle of the inclined louvers. This results in both structures discharging the air substantially parallel to the ceiling. The fact that in the accused structure the angled and directional vanes are positioned in a slightly different manner than the angled and directional vanes in the patent in suit in no way affects the result or mode of operation.

This petition is filed respectfully requesting this Court to review the decision and judgment of the Court of Appeals for the Ninth Circuit dated February 15, 1954, and to instruct said Court to enter a judgment in accordance with its opinion and judgment of May 27, 1953, which opinion was vacated in its opinion of February 15, 1954.

Questions Presented.

The judgment of the Court of Appeals for the Ninth Circuit raises the following questions of law:

1. When a patent claim comprises a new combination of elements and produces a new result, is it not contrary to law and the decisions of this Court for a Court of Appeals to hold that said patent is restricted to the specific construction shown and described in said patent?

2. When a patent claim comprises a new combination of elements producing a new result, is it not contrary to law and the decisions of this Court and other Courts of Appeals than the Ninth Circuit to hold that a known element in the prior art, used in a different combination, cannot be an equivalent of an element in the combination of the patent?

3. When a patent claim comprises a new combination of elements producing a new result, is it not contrary to

law and the decisions of this Court for the Court of Appeals for the Ninth Circuit to fail to apply the doctrine of equivalents as applied by this Court in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U. S. 605, 94 L. Ed. 1097, and to hold that said claim was entitled to a range of equivalents commensurate with the advance in the art?

Reasons Relied Upon for the Allowance of the Writ of Certiorari.

1. That the Court of Appeals for the Ninth Circuit in holding claims 1, 2 and 5 of patent 2,240,617 valid but limited to the specific structure shown and described in the patent has rendered a decision in direct conflict with the holding of this Court in *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 52 L. Ed. 1122; *Imhaueser v. Buerk*, 101 U. S. 647, 20 L. Ed. 945 (Rule 38, Sec. 5(b) of the Rules of this Court).

2. That the above judgment and decision of the Court of Appeals for the Ninth Circuit is in direct conflict with the decision of this Court in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U. S. 605, 94 L. Ed. 1097, wherein a known element in the prior art not previously used in a combination producing the result of the patent there in suit was held to be an equivalent, *i.e.*, the mere fact that an element is old in a particular art does not prevent it from being an equivalent (Rule 38, Sec. 5(b) of the Rules of this Court).

3. That the respondents are the only ones that are manufacturing and selling air distributors embodying the invention of the Harrigan patent 2,240,617 [R. 150] and your petitioner will be unable, unless the decision of the Court of Appeals for the Ninth Circuit is reviewed by this Court, to obtain another adjudication of a patent about which there is a very serious question as to infringement and the scope of said patent and the claims thereof, as clearly shown by the original decision of the Court of Appeals for the Ninth Circuit dated May 27, 1953. That said patent involves air distributors used in conjunction with air distributing or conditioning systems which are universally used throughout the United States and which are of great importance in the economy of the United States.

For the foregoing reasons, it is respectfully requested that the petition for writ of certiorari should be granted.

Respectfully submitted,

REGINALD E. CAUGHEY,

JAMES C. LEDBETTER,

Attorneys for Petitioner.

State of California, County of Los Angeles—ss:

Reginald E. Caughey, being first duly sworn, deposes and says: That he is one of the attorneys for the petitioner herein; that he prepared the foregoing petition and that the allegations therein are true as he verily believes.

REGINALD E. CAUGHEY.

Subscribed and sworn to before me this 18th day of June, 1954.

FRANCES L. RICHMOND,
Notary Public in and for the County and State above-named.

(Seal)

My Commission expires March 7, 1958.

IN THE

Supreme Court of the United States

October Term, 1953.

No. .....

AIR DEVICES, INC.,

Petitioner,

vs.

AIR FACTORS, INC., CONDITIONAIRE, LTD., and FRED M. McCOWN,

Respondents.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinions of the Courts Below.

The District Court in its judgment of January 15, 1951 [R. 57-58] held claims 1, 2 and 5 of Harrigan patent in suit 2,240,617 to be valid but not infringed and to be limited to the specific structure described in the patent.

The Court of Appeals for the Ninth Circuit (97 U. S. P. Q. 519, May 27, 1953) reversed the District Court and remanded the cause with directions to issue the injunction prayed for in the complaint and to proceed with the accounting therein sought. In so doing, it without difficulty found infringement. Subsequently the respondents filed a

petition for rehearing which was granted July 13, 1953. After oral rehearing on November 20, 1953, the Court of Appeals for the Ninth Circuit entered its judgment and decision of February 15, 1954, affirming the judgment of the Court below. The decision followed closely the decision of the District Court. We, therefore, have the Court of Appeals for the Ninth Circuit reversing itself within a period of several months and entering a judgment and decision which is absolutely contrary to its original judgment and decision of May 27, 1953.

This petition is to reverse the Court of Appeals for the Ninth Circuit on the grounds that:

1. The Court has not granted the claims in issue any scope but has restricted the same to the exact construction shown in the patent, although a new result is obtained by the structure so described.

2. In considering the question of infringement in its decision of February 15, 1954, the Court failed to recognize that all patents are entitled to a range of equivalents, depending upon the contribution to the art which was made by the patent before the Court.

3. In a patent for a combination of elements producing a new result, the fact that an element is known in the art but in different combinations or environments does not prevent said element from being held to be an equivalent of an element in the combination of the patent.

4. The law is, as applied by this Court in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U. S. 605,

94 L. Ed. 1097, that in a patent producing a new result a known element in the art may be an equivalent of an element in the patented combination whether said combination be chemical or mechanical.

Jurisdiction.

The grounds for jurisdiction are:

1. The decision of the Court of Appeals was first rendered May 27, 1953 (97 U. S. P. Q. 519). Respondents' petition for rehearing was granted by the Court of Appeals on July 13, 1953. The oral rehearing was held November 20, 1953. The second opinion of the Court of Appeals was entered February 15, 1954 (210 F. 2d 481, 100 U. S. P. Q. 296).

2. The decree was entered in a suit in equity brought under the patent statutes to determine the validity and infringement of Letters Patent of the United States (35 U. S. C., Sec. 31) and to recover damages for infringement and to obtain an injunction (35 U. S. C., Sec. 70).

3. The statute under which the jurisdiction of this Court is invoked is Title 28, United States Code, Section 1254.

4. The cases believed to sustain the jurisdiction are: *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U. S. 605, 94 L. Ed. 1097; *United Carbon Co. v. Binney & Smith Co.*, 317 U. S. 228, 87 L. Ed. 232; *Schriber-Schroth Co. v. Cleveland Trust Co.*, 31 U. S. 211, 85 L. Ed. 132; *Great Atlantic & Pacific Tea Co. v. Supermarket*

Equipment Corp., 340 U. S. 147, 95 L. Ed. 162; *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 52 L. Ed. 1122, and *Imhaeuser v. Buerk*, 101 U. S. 647, 20 L. Ed. 945.

Statement.

The facts are stated in the petition.

Statutes.

The statutes under which this case arises are the Revised Statutes Sec. 4886 (U. S. C. Title 35, Sec. 31), and Revised Statutes Sec. 4921 (U. S. C. Title 35, Sec. 70). The Lower Court had jurisdiction of the case by virtue of the provisions of Section 1338(a) of Title 35, United States Code.

Specification of Errors.

The errors which petitioner will urge if the writ of certiorari is granted are that the Court of Appeals for the Ninth Circuit erred:

1. In failing to hold the Harrigan patent 2,240,617 infringed by respondents.

2. In holding that the Harrigan patent 2,240,617 was restricted to the specific construction described in the patent.

3. In withdrawing its prior decision and judgment of May 27, 1953, reversing the judgment of the District Court.

4. In failing to apply the law pertaining to the doctrine of equivalents as established by this Court, *e. g., Graver Tank & Mfg. Co. v. Linde Air Products Co.,* 339 U. S. 605, 94 L. Ed. 1097.

5. In holding that a known element in the prior art prevented it from being considered as an equivalent for an element in the patented combination where the patented combination produced a new result.

Summary of Argument.

The points of the argument restate the reasons relied upon for the allowance of the writ of certiorari as stated in the petition and may be summarized as follows:

POINT I: The doctrine of equivalents should be invoked for all patents and not merely for pioneer ones, with the range of equivalents depending upon the contribution made to the art.

POINT II: The fact that an element is known in the art as of the date of invention of a patent will not prevent said element from being considered and held to be the equivalent of an element in a combination of elements producing a new result.

ARGUMENT.

POINT I: "The doctrine of equivalents should be invoked for all patents and not merely for pioneer ones, with the range of equivalents depending upon the contribution made to the art."

This Court has held in *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 52 L. Ed. 1122, 1126, that all patents are entitled to invoke the doctrine of equivalents and that the range of equivalents depends upon and varies with the invention made and the contribution which was made to the art. In so holding, this Court followed its earlier decisions in *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 204, 38 L. Ed. 121; *Computing Scale Co. v. Automatic Scale Co.*, 204 U. S. 609, 51 L. Ed. 645; *Deering v. Winona Harvester Works*, 155 U. S. 286, 39 L. Ed. 153. The record in the instant case and certified to this Court clearly shows that there are no patents in the prior art which disclose the combination of elements of the Harrigan patent or which disclose its means or mode of operation. There is no patent in the prior art which discloses a construction of an air distributor whereby the entire mass of the air discharged from the distributor is at high velocity and is substantially parallel to the plane of the ceiling or wall in which it is secured. Although the advantages of so discharging the entire mass of air were recognized in the prior art, no one had solved the problem by constructing an air distributor which would be commercially practical. The Harrigan patent solved the problem by a combination of inclined louvers and angled directional vanes which without any moving parts functioned to cause the entire mass of the air to be dis-

charged substantially parallel to the ceiling, for example, even though the angle of inclination of the louvers was approximately thirty percent from the vertical.

No one in the prior art, even though louvers and vanes were common therein, had come forward with the idea of causing the entire mass of air contacting an inclined louver to be diverted in direction by associated angled and directional vanes, even though it was well known in the art that louvers *per se* and vanes *per se* would change the direction of air. A patent in an art such as the air distributor art making such a contribution should not be restricted to the specific construction shown and described in the patent but should be accorded a scope, including a range of equivalents, which is commensurate with the contribution made. In limiting the patent to the specific structure described, the Court of Appeals for the Ninth Circuit is in direct conflict with the decision of this Court in *Continental Paper Bag Co. v. Eastern Paper Bag Co., supra,* and the other cases cited therein.

If the word "means" were included in the claims in issue instead of specific structure, then, pursuant to the provisions of Sec. 112 of the Patent Act which became effective January 1, 1953, such claim should be construed to cover the corresponding material, structure or acts described in the specification and equivalents thereof. It is not incumbent upon any patentee to use the word "means" in a claim. Petitioner should not be penalized because of the failure so to do and have the claims restricted to the specific construction. Section 112 of the Patent Act effective January 1, 1953, is merely a reiteration of the doctrine laid down by this Court in *Continental Paper Bag Co. v. Eastern Paper Bag Co., supra,* and similar cases.

The Court of Appeals for the Ninth Circuit has failed to properly consider and apply the law as to the scope of the claims in issue and its decision is in conflict with the cited decisions of this Court.

POINT II: "The fact that an element is known in the art as of the date of invention of a patent will not prevent said element from being considered and held to be the equivalent of an element in a combination of elements producing a new result."

This Court has previously held that an element to be considered an equivalent for an element in a combination patent must be known in the art. *Morley Sewing Machine Co. v. Lancaster,* 129 U. S. 263, 32 L. Ed. 715; *Rowell v. Lindsay,* 113 U. S. 97, 28 L. Ed. 906; *Halliburton Oil Well Cementing Co. v. Walker,* 329 U. S. 1, 91 L. Ed. 3.

Such a holding precludes that elements which were not known in the art at the time of the invention of the patent involved could be equivalents. The Court of Appeals for the Ninth Circuit by holding that merely because an element is a known element it should not be designated as an equivalent would preclude, therefore, the application of the doctrine of equivalents, both as to known and to unknown elements.

Admittedly the test of infringement is not test of result. *Westinghouse v. Boyden Power Brake Co.,* 170 U. S. 537, 42 L. Ed. 1136. The respondents have obtained the same result by merely taking the angled directional vane, which in the preferred embodiment of the invention as described in the patent is shown as placed on the back of the inclined louver, and placing it on an extended portion of the inclined louver which has been straightened. In so doing, as

found by the Court of Appeals for the Ninth Circuit in its original opinion of May 27, 1953, it was merely a minor departure from the structure described in the patent and utilized all of the advantages of the invention.

The file wrapper of the patent in suit, Defendants' Physical Exhibit F, discloses on numbered pages 8 and 9 thereof, that the claims in issue were allowed as filed and that, therefore, there was no limitation as to the angled vane being on the inclined louver, nor did any of the patents cited in the prosecution of the application or which were before the District Court or Court of Appeals impose such a limitation.

The fact that the Court of Appeals for the Ninth Circuit found there existed in the prior art angled directional vanes which would function to change the direction of air when interposed in an air stream does not prevent the Court of Appeals from applying the doctrine of equivalents so that the respondents would not be permitted to use an element in the patented combination and as a substitute for an element therein.

This Court in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U. S. 605, 94 L. Ed. 1097, in holding an element in the accused chemical composition to be the equivalent of an element in the patented combination there before the Court, went carefully into the law upon the question of equivalents. In its decision at page 1103 it stated:

> "* * * Consideration must be given to the purpose for which an ingredient is used in a patent, the qualities it has when combined with the other ingredients, and the function which it is intended to perform. An important factor is whether persons reason-

> ably skilled in the art would have known of the interchangeability of an ingredient not contained in the patent with one that was."

The Court thereafter found that the substitution of silicates of calcium and manganese for silicates of calcium and magnesium would not avoid infringement where it was known in the art that manganese and magnesium were similar in many of their reactions and where the same result was obtained in the accused composition.

The use of an angled vane by respondents, even though it be conceded that said angled vane was old in the art, and placing the same at a position other than as called for in the patent, where the angled vane functioned to divert air in the same manner as in the patent in suit, cannot prevent the application of the doctrine of equivalents in a combination of elements which, as in the *Graver* case, produced a new result. We do not have here a case where a combination of elements produces a better result and where all of the elements were contained in one or more patents in the prior art which produced a similar result.

The Court of Appeals for the Ninth Circuit in its original decision of May 27, 1953, having the devices of the petitioner and respondents before it and having before it copies of the prior art patents, had no difficulty in arriving at the decision that the District Court was in error in entering its judgment and that the Harrigan patent before it should be entitled to a scope which would include the accused structures. No additional evidence was presented at the oral rehearing or included in the record certified to this Court which would have caused the Court of Appeals for the Ninth Circuit to have changed its prior and original opinion. The Court of Appeals in its decision of

February 15, 1954 (210 F. 2d 481) does not specifically point out wherein its previous decision was wrong. The only reasons which your petitioner can ascribe for the second decision of said Court is the fact that it erroneously concluded that an element could not be an equivalent which was known in the art even though there was no combination of elements, producing such a result as the patent produced, in the prior art.

Conclusion.

The Supreme Court should grant the prayed for writ of certiorari in this case in order that the Court of Appeals for the Ninth Circuit and other Courts of Appeals, which may be influenced by or follow the decision in the instant case, may properly apply the doctrine of equivalents as frequently enunciated by this Court and as recently as *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U. S. 605, 94 L. Ed. 1097. In considering the petition this Court should also consider that, in view of the fact that no others are infringing the Harrigan patent, the petitioner will have no opportunity to seek a different decision in any other Court of Appeals. It is believed, therefore, that the questions of law involved are of great importance and should be determined by this Court.

Respectfully submitted,

REGINALD E. CAUGHEY

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Attorneys for Petitioner

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AIR FACTORS, INC., CONDITIONAIRE, LTD., and FRED M. MCCOWN,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI.

Respondents hereby oppose the petition for writ of certiorari filed herein by Air Devices, Inc., on the primary ground that no special or important reasons exist for review by this Court.

THE OPINION AND JUDGMENT OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT subject to review was entered February 15, 1954 (210 F. 2d 481, 100 U. S. P. Q. 296) [R. 326-331; reproduced here in App. p. 1]. A petition for rehearing was timely filed by petition and denied by the Court of Appeals March 24, 1954 [R. 332].

The opinion of the Trial Court (U. S. Dist. Ct., S. D. Cal., C. D.), is reported at 94 Fed. Supp. 819, 88 U. S. P. Q. 454 [R. 43-51 and reproduced here in App. p. 5]. It is to be noted that a former opinion of the Court of Appeals in this case rendered May 27, 1953, Circuit Judge Healy dissenting (97 U. S. P. Q. 519), was **withdrawn and is not subject to review.**

JURISDICTION.

This Court has jurisdiction as alleged in the petition.

NO SUBSTANTIAL QUESTIONS ARE PRESENTED.

The alleged questions presented on page 5 of the petition are hypothetical, without substance and misleading since they assume facts which are contrary to those stated in the opinion of the Court of Appeals.

Each of the petitioner's questions starts with the premise

> "When a patent claim comprises a new combination of elements, * * *."

This is a false premise since the Trial Court pointed out that the claims related to a combination of louver plates or baffles and vanes in an air distributing grill and "the prior art shows various elements of louver plates or baffles and vanes" [R. 47, App. p. 8].

> "This prior art, * * * and others, teach, in one form or another, all the principles taught by this patent and the means of achieving them." [R. 47-48, App. p. 9.]

The Court of Appeals, in its opinion, affirming the Trial Court, states that:

> "* * * many prior patents had used inclined louvers and vanes to control and direct air passing therethrough * * * the claims in suit amount to a combination of old elements, * * *." [R. 327, App. pp. 1-2.]

Petitioner's questions are therefore wholly hypothetical and without substance. This Court should not waste its time on moot questions nor on questions based on assumed facts which are not supported by the record. The petition for writ of certiorari should be denied.

THE PETITION FAILS TO PRESENT SPECIAL AND IMPORTANT REASONS FOR REVIEW.

Purported questions of law, based on assumed and fictitious facts, do not constitute "special and important" reasons contemplated by Rule 19 (Revised Rules of the Supreme Court).

The hypothetical questions presented by the petition are not substantial for the reason advanced hereinabove and also because they refer to a "new result," whereas the Court of Appeals did not find that the combination of old elements produced a new result.

The Court of Appeals limited the patent in suit to the particular construction defined in the claims (in order to escape invalidity) because a "result" or purpose is not patentable.

> "* * * it is well settled by the authorities that the *end or purpose sought to be accomplished by the device is not the subject of a patent.* The invention

covered thereby must consist of new and useful *means* of obtaining that end. In other words, the subject of a patent is the *device or mechanical means* by which the desired result is to be secured. Carver v. Hyde, 16 Pet. 513, 519; LeRoy v. Tatham, 14 How. 156; Corning v. Burden, 15 How. 252; Barr v. Duryee, 1 Wall. 531; Fuller v. Yentzer, 94 U. S. 288."

Knapp v. Morss, 150 U. S. 227.

"* * * But this result or idea is not monopolized by the patent. *The thing patented is the particular means* devised by the inventor by which that result is attained, leaving it open to any other inventor to accomplish the same result by other means."

Electric R.R. Signal Co. v. Hall Ry. Signal Co., 114 U. S. 87, 29 L. Ed. 96.

It is submitted that petitioner, in order to give apparent substance to its petition, has assumed facts contrary to the record in presenting its questions. When the questions are modified to conform to the record and directed to an old combination of old elements in a crowded field (that this is a crowded art is admitted by petitioner), then such questions have been answered correctly by the Court of Appeals in this case upon the authority of *Computing Scale Co. v. Automatic Scale Co.,* 204 U. S. 609, 621 [quoted by the Court in its opinion, R. 329, App. p. 3] and many other cases.

It is submitted that the petition fails to show the Court of Appeals rendered a decision in conflict with the holdings of this Court. The *Continental Paper Bag Co. v. Eastern Paper Bag Co.* case (210 U. S. 405) relied upon

by petitioner is clearly not in point. In the *Paper Bag* case

> "The lower courts, therefore, found that the invention was a broad one * * *." (210 U. S. at 416)

whereas here the patent is in a crowded field and is so narrow that the claims must be given a narrow construction "* * * in order to escape invalidity * * *." [Op. of Court of Appeals R. 329, App. p. 3.]

In the *Paper Bag* case the prior patents did not combine a forming plate with a rotating cylinder:

> "The forming plate and the cylinder have never been combined." (210 U. S. at 421)

whereas here many prior patents used the same elements and these prior patents

> "* * * disclosed constructions so similar to the one here involved that the claims in suit amount to a combination of old elements, and in order to escape invalidity by being read so broadly as to read upon the prior art, they must be restricted to the specific device described in the patent." (Op. of Court of Appeals R. 327, App. pp. 1-2.]

The *Paper Bag* case is not applicable on the facts, and instead, the Court of Appeals correctly followed the holding of this Court in *Computing Scale Co. v. Automatic Scale Co.*, 204 U. S. 609. There this Court made a distinction between broad and narrow inventions stating

> "* * * it is of that narrow character of invention which does not entitle the patentee to any considerable range of equivalents, but must be practically limited to the means shown by the inventor." (204 U. S. at 621.)

This rule was followed by the Court of Appeals and the above language was quoted by the Court in its opinion R. 329].

Other cases which sustain the opinion and judgment and refute petitioner are:

Dashiell v. Grosvenor, 162 U. S. 425, 432, 16 S. Ct. 805, 40 L. Ed. 1025;

Knapp v. Morss, 150 U. S. 221, 228, 14 S. Ct. 81, 37 L. Ed. 1059;

Boyd v. Janesville Hay-Tool Co., 158 U. S. 260, 267, 15 S. Ct. 837, 39 L. Ed. 973;

Duff v. Sterling Pump Co., 107 U. S. 636, 2 S. Ct. 487, 27 L. Ed. 517;

Kokomo Fence Machine Co. v. Kitselman, 189 U. S. 8, 23 S. Ct. 521, 47 L. Ed. 689.

In the last listed case, this Court stated:

> "In view of what passed in the Patent Office, and the state of the art, we cannot regard the Kitselman patent as a pioneer patent, but think its claims *must be limited in their scope to the actual combination of essential parts as shown,* and cannot be construed to cover other combination of elements of different construction and arrangement." (189 U. S. 8 at 18-19.)

The Court of Appeals for the Ninth Circuit correctly held that the claims were not infringed because

> "It is quite apparent that the accused device employs a **different** construction and a **different** mode of operation than that covered by the claims in plaintiff's patent." [R. 329, App. p. 4.]

The broad question with respect to the application of the doctrine of equivalents to limited claims in a crowded

art was properly answered by the Court of Appeals by applying the principles enunciated by this Court in the cases above cited and in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U. S. 605 at 608-609. In the last-mentioned case it was stated:

> "Thus where a device is so far changed in principle from the patented article that it performs the same or similar functions in a substantially *different* way, but nevertheless falls within the literal words of the claim, the doctrine of equivalents may be used to *restrict* the claim and defeat the patentee's action for infringement." (339 U. S. at 608-609.)

This last expression of the rule was considered by the Trial Court [R. 49-50] in view of the fact that a **different** mode of operation is used by respondents.

Finally, the opinion of the Court of Appeals for the Ninth Circuit is not in conflict with the decision of another Court of Appeals on the same matter; no new question of federal law has been decided; it has not decided a federal question which is in any way in conflict with applicable decisions of this Court. Public interest in a specific arrangement of old louvers and vanes or baffles does not justify this Court to review the carefully considered opinion and judgment of the Court of Appeals for the Ninth Circuit, affirming a Trial Court which also rendered a considered opinion.

Respectfully submitted,

C. A. MIKETTA,

Attorney for Respondents.

Certificate of Service

(Pursuant to Rule 33, paragraph 3(b).)

It is hereby certified that two copies of the above "Respondents' Brief in Opposition to Petitioner's Petition for Writ of Certiorari" has been personally served upon Reginald E. Caughey, attorney for Petitioner, at his office, pursuant to Rule 31, paragraph 1, Revised Rules of the Supreme Court of the United States, on July 20, 1954.

C. A. MIKETTA.

APPENDIX.

Opinion of the Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Air Devices, Inc., a corporation, Appellant, vs. Air Factors, Inc., a corporation; Conditionaire, Ltd., a corporation, and Fred M. McCown, Appellees. No. 12,921.

Feb. 15, 1954.

Appeal from the United States District Court for the Southern District of California, Central Division.

On Rehearing.

Before STEPHENS, HEALY and POPE, Circuit Judges.

POPE, Circuit Judge.

The former opinion, given prior to rehearing herein, is withdrawn, and this one filed in its stead. This is an appeal from a judgment in an action for infringement of Harrigan Patent 2,240,617, issued May 6, 1941. The trial court held that the claims in issue, 1, 2 and 5, were not infringed. It held that the patent was valid if limited to the specific construction described in the patent.

The patent discloses a device for introducing air into a room, called an "air distributor." It is a grill constructed with a combination of louvers and vanes. The louvers are spaced, in an inclined position, parallel to each other and parallel to the sides of the frame in which they are placed. Upon one surface of each of the louvers are vanes extending in an oblique direction relative to the longitudinal dimension of the louvers.

The court found that the patent in suit was in a crowded field; that many prior patents had used inclined louvers and vanes to control and direct air passing therethrough; that these had disclosed constructions so similar

to the one here involved that the claims in suit amount to a combination of old elements, and that in order to escape invalidity by being read so broadly as to read upon the prior art, they must be restricted to the specific device described in the patent. The court found that the accused device, manufactured by the defendant-appellees, had substantially different mechanical construction and means of operation from that of plaintiff-appellant. It held the claims of plaintiff's patent valid when so limited to the specific construction described, but that the device made by defendants did not infringe those claims.

Upon this appeal plaintiff attacks the court's conclusion that its claims must be limited to the specific construction described in the patent in suit. It admits the patent is not a basic one, but urges that it represented a material advance in the art, even although that art was crowded. It claims that the court should apply the doctrine of equivalents. If the patent is entitled to a range of equivalents, then, it says, defendants have infringed. It points to experiments performed in the trial court, some of them repeated in this court, showing that exhibit 4, one of plaintiff's structures, and exhibit 5, one of the accused devices, distributed air into a room in substantially the same way.

The first of the three claims here in issue reads:

> "1. An air-distributing device comprising a plurality of plates disposed in spaced, substantially parallel relation, the front edges of said plates lying in substantially a single plane, and said plates being inclined relatively to said plane, and vanes provided on one surface of each of said plates, said vanes extending in an oblique direction relatively to the longitudinal dimensions of the plates."

It is noted that the vanes are stated to be on but one surface of the plates. And the only way in which such inclined vanes can be so placed is through the use of triangular vanes, as the specifications note.

Now, as the trial judge said, plaintiff "admitted that the normal and expected function of plate-like louver elements arranged in parallel spaced relation in and air distributor or grill is to form passageways, between such louver elements which direct air passages through it. It was also conceded that long before the patent in suit, it was known in this country that the direction of flow of air through a grill could be controlled by the angles of the planes in which the louver elements were placed. The prior art shows various elements of louver plates or baffles and vanes."

If these claims, all in respect to the question now before use substantially the same as the one just quoted, were to be construed so as to encompass these well-known features and functions of louvers and vanes, they would be void as broader than the true invention. As this court said in Nye & Nissen v. Kasser Egg Process Co., 96 F. 2d 420, 424, quoting from an earlier decision: "Plaintiff is to be held to a construction of his patent whereby nothing shall be included which is disclosed by prior patents of devices prevailing in public use or known to the public."

It follows that the district court properly held that the claims in order to escape invalidity, must be given a narrow construction. So construed, "it is of that narrow character of invention which does not entitle the patentee to any considerable range of equivalents, but must be practically limited to the means shown by the invention." Computing Scale Co. v. Automatic Scale Co., 204 U. S. 609, 621.

It is quite apparent that the accused device employs a different construction and a diffeernt mode of operation than that covered by the claims in plaintiff's patent. We have noted plaintiff's triangular vanes, all on one side. Defendants have not used this construction.

The court also found as a fact that the defendants' device operated differently from that of the plaintiff in that the former has two separate and distinct mechanical means for successively deflecting the air in two steps, whereas plaintiff's imparts but a single deflection. The evidence warrants that finding. And since this double step, successive deflection process was admitted by plaintiff's own witnesses to have been known in the prior art, it is plain that no permissible range of equivalents can permit plaintiff's claims to bar the use by defendants of that which was not new. "The range of equivalents to be allowed cannot be extended to cover means which have clear antecedents in the prior patented art." International Harvester Co. v. Killefer Mfg. Co., (9 cir.) 67 F. 2d 54, 61. The same principle applies here.

The fact that the two devices accomplish the same result, or perform the same function, settles nothing about infringement. Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 554; Cimiotti Unhairing Co. v. Am. Fur. Ref. Co., 198 U. S. 399, 414. Identity of result is no test. Stebler v. Porterville Citrus Assn., (9 cir.), 248 F. 927. As the results obtained are not secured by the same means, or by a device operated in the same manner, or in substantially the same manner, the several devices are not equivalents. Leishman v. Associated Wholesale Electric Co., (9 cir.), 137 F. 2d 722, 727.

The judgment is affirmed.

(Endorsed:) Opinion. Filed Feb. 15, 1954. Paul P. O'Brien, Clerk.

Opinion of Trial Court.

District Court, S. D. California, Central Division.

Air Devises, Inc. v. Air Factors, Inc., *et al.* No. 11793. Decided Jan. 2, 1951.

PATENTS.

Action by Air Devices, Inc., against Air Factors, Inc., Conditionaire, Ltd., and Fred M. McCown for patent infringement. Complaint dismissed.

Lyon & Lyon and Reginald E. Caughey, both of Los Angeles, Calif., and James C. Ledbetter, New York, N. Y., for plaintiff.

C. A. Miketta, Los Angeles, Calif., for defendants.

Yankwich, District Judge.

Action for infringement of Letters Patent 2,240,617, issued May 6, 1941, to P. D. Harrigan, assignor to plaintiff, Air Devices, Inc.

The claims involved are 1, 2 and 5, which read:

"1. An air-distributing device comprising a plurality of plates disposed in spaced substantially parallel relation, the front edges of said plates lying in substantially a single plane and said plates being inclined relatively to said plane, and vanes provided on one surface of each of said plates, said vanes extending in an oblique direction relatively to the longitudinal dimensions of the plates."

"2. An air-distributing device comprising a plurality of plates disposed in spaced substantially parallel relation, the front edges of said plates lying in substantially a

single plane, and said plates being inclined relatively to said plane, and vanes provided on one surface of each of said plates, said vanes extending in an oblique direction relatively to the longitudinal dimensions of the plates, and said vanes extending into the spaces between the plates."

"5. An air-distributing device comprising a plurality of plates disposed in spaced substantially parallel relation, the front edges of said plates lying in substantially a single plane, and said plates being inclined relatively to said plane, and vanes provided on one surface of each of said plates, said vanes extending in an oblique direction relatively to the longitudinal dimensions of the plates, and the vanes on one plate extending at an angle to those on an adjacent plate."

The patent is for an "air-distributor". Its validity and that of the claims involved are challenged on the ground of lack of invention in the combination of old elements.

Two cardinal principles which control the problem of the combination of old elements to achieve patentable new uses have been polarized in two recent decisions of the Supreme Court. The conditions which speak for patentability were stated for the Court by Mr. Justice Jackson in Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U. S. 605, 608 [85 USPQ 328, 330]; "The theory on which it is founded is that 'if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form or shape.' Machine Co. v. Murphy, 97 U. S. 120, 125. The doctrine operates not only in favor of the patentee of a pioneer or primary invention, but also for the patentee of a secondary invention con-

sisting of a combination of old ingredients which produce new and useful results, Imhaeuser v. Buerk, 101 U. S. 647, 655 although the area of equivalence may vary under the circumstances."

The negative rule, couched in language which is almost a *warning* and *command* to trial courts, was stated by the same Justice in the Great Atlantic & Pacific Tea Company v. Supermarket Equipment Corporation, 71 S. Ct. 127, 130 [87 USPQ 303, 306]; "Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements. The function of a patent is to add to the sum of useful knowledge. Patents cannot be sustained when, on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements with no change in their respective functions, such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men."

There is also the warning of another leading case that a device must not only be new and useful, but *must also amount to invention.* Cuno Engineering Corporation v. Automatic Devices Corp., 314 U. S. 84, 90 [51 USPQ 272, 275]: "We may concede that the functions performed by Mead's combination were new and useful. But that does not necessarily make the device patentable. Under the statute, 35 U. S. C. §31, the device must not only be 'new and useful', it must also be an 'invention' or 'discovery'. Thompson v. Boisselier, 114 U. S. 1, 11. Since Hotchkiss v. Greenwood, 11 How. 248, 267, decided in 1851, it has been recognized that if an improvement

is to obtain the privileged position of a patent more ingenuity must be involved than the work of a mechanic skilled in the art."

The solution of the problem before the Court involves the application of these principles. Involved are Claims 1, 2 and 5 of the letters patent in suit, relating to a combination of louver plates or baffles and vanes in a grill intended for use as an "air distributor". These claims are limited to inclined louvers with edges in a single plane and vanes which extend in an oblique direction relative to the longitudinal dimension of the louver plate.

The object of the invention is to diffuse and deflect air through a grill in an air conditioning system close to the ceiling, so as not to blow downwardly but to gradually diffuse downwardly.

In Answer to Requests for Admissions,—Rule 36, Federal Rules of Civil Procedure, 28 U. S. C. A.—the plaintiff has admitted that the normal and expected function of platelike louver elements arranged in parallel spaced relation in an air distributor or grill is to form passageways between such louver elements which direct air passages through it. It was also conceded that long before the patent in suit, it was known in this country that the direction of flow of air through a grill could be controlled by the angles of the planes in which the louver elements were placed. The prior art shows various elements of louver plates or baffles and vanes.

With these facts in mind, it is evident that the invention is very limited and in a crowded field. The inventor cannot, and does not, claim the discovery of the principle of physics that currents of air can be caused to be mixed at a definite level by mechanical "stirring".

All he claims is a special method of introducing and distributing air into a room by means of a ventilating or air conditioning grill constructed in a particular way.

Grills are old in the art, dating back to orifices or openings to allow air into rooms shown in buildings constructed hundreds of years ago, long before formal windows came into use. And louvers to control and regulate the quantum of the flow are old in the art. One patent dates back to 1870. This prior art, especially Oskamp, 2,021,086, Burner, 2,029,153, Young, 2,096,271, Germonprez, 2,135,810, Germonprez, 2,195,412, Candor 2,210,023, and others teach, *in one form or another,* all the principles taught by this patent and the means of achieving them. Indeed, it was demonstrated at the trial that by merely tilting the louvers of the preferred Candor invention, one obtained a construction according to the teachings of the patent in suit. And, while this is not conclusive, it is very revealing. See Grant v. Koppl, 99 F. 2d 106, 110 [39 USPQ 36, 41-42]; McRoskey v. Braun Mattress Co., 107 F. 2d 143, 147 [43 USPQ 318, 321]; Braun, Inc. v. Kendall-Lamar Corporation, 116 F. 2d 663, 665 [48 USPQ 154, 156]. Basically, as a method of construction, the object of the invention is to permit an inexpensive construction by casting. The accused device calls for a more complicated, *if not more cumbersome,* individual shop construction. See, Mantz v. Kersting, 29 F. Supp. 706, 710 [43 USPQ 214, 218-219]. There is a single deflection of air in the plaintiff's device. The accused has means for deflecting the air twice. And the fact that the area of the first deflection is so small that the ultimate result is not affected—(See, Houghten and others, Frictional Resistance to the Flow of Air in Straight Ducts, No. 1105, Transactions A SHVE, 1939, pp. 35-41)—is not con-

trolling in determining identity. For we have two *separate and distinct mechanical means for achieving the result.* The accused device, assuming that its ultimate functional result is the same, achieves it by two mechanical methods of deflection. In addition, the accused device does not have triangular vanes, or vanes on one surface and the baffles in it are at right angles to the plates. So that, assuming that the object of the invention is to direct air into a room in a certain manner and that the accused device achieves this object, it is evident that the accused device resorts to two means of deflection. These are secured by a different and more complex construction, some of the characteristics of which have been referred to.

The result is this: If the claims in suit are read (as *plaintiff wishes us to do*), so as to include every means for deflecting air into a room by means of parallel louver blades and vanes within a frame, there is no invention. For the criterion required to be met by the cases cited, and especially Cuno Engineering Corp. v. Automatic Devices Corp., *supra* are not met. The only escape from invalidity lies in restricting the invention to the specific device embodied in the specifications.

A situation such as this was envisaged by the Supreme Court in Graver Tank & Mfg. Co. v. Linde Air Products, *supra* when Mr. Justice Jackson wrote: "The wholesome realism of this doctrine is not always applied in favor of a patentee but is sometimes used against him. Thus, where a device is so far changed in principle from a patented article that it performs the same or a similar function in a substantially different way, but nevertheless falls within the literal words of the claim, *the doctrine of equivalents may be used to restrict the claim and defeat*

the patentee's action for infringement." 339 U. S. at pages 608-609 [85 USPQ at 330]; (Emphasis added.) And see, Harries v. Air King Products Co., 183 F. 2d 158, 161 [86 USPQ 57, 60].

We, therefore, find that the Claims in suit, Claims 1, 2 and 5 are valid but not infringed.

It should be added that, while the granting of attorney's fees is discretionary, 35 U. S. C. §70, I do not believe the discretion should be exercised in this case in favor of attorneys' fees for the defendants. The patentee, who, relying upon the presumption of validity which flows from the issuance of the letters patent, comes into court in good faith and seeks to establish infringement, *should not be penalized* for the act by an award of attorney's fees,—especially when, although infringement in the particular instance is not found, the Claims in suit are held to be valid. More, as stated from the bench, repeatedly, I think it would be detrimental to the patent system to allow attorney's fees, except in cases where the Court feels one party or another has been guilty of unfair or oppressive methods in pursuing the legal remedies allowed. See, Official Aviation Guide Co. v. American Aviation Associates, 162 F. 2d 541, 543 [74 USPQ 45, 46-47]; Dixie Cup Co. v. Paper Container Mfg. Co. 174 F. 2d 834 [82 USPQ 1]; Dubil v. Rayford Camp & Co., 184 F. 2d 899, 902-903 [87 USPQ 143, 145-146].

Judgment will, therefore, be for the defendant upon findings that the Claims in suit, Claims 1, 2, and 5, of Harrigan Patent, 2,240,617, dated May 6, 1941, are valid, but not infringed by the defendants. Each side to pay their own costs. No attorneys' fees.